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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1929

INTERNATIONAL SHOE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINION BELOW

The opinion of the Circuit Court of Appeals for the First Circuit (R. 705) is reported in 29 F. (2d) 518.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 27, 1928. (R. 715.) Petition for certiorari was filed February 25, 1929, and was granted May 20, 1929. (R. 716.)

Jurisdiction of this Court rests on Section 11 of the Clayton Act, c. 323, 38 Stat. 730, 735 (U. S. C.

Title 15, Sec. 21), as amended by the Act of February 13, 1925. *Federal Trade Commission* v. *Western Meat Company,* 272 U. S. 554, 557.

QUESTIONS PRESENTED

The questions presented are (1) whether there is sufficient evidence to support the determination of the Federal Trade Commission that petitioner's acquisition of the stock of W. H. McElwain Company in May, 1921, had the effect of substantially lessening competition between the companies in violation of Section 7 of the Clayton Act, (2) whether the financial condition of the McElwain Company in May, 1921, was such that the only reasonable inference is that it would have gone out of business but for petitioner's purchase of its stock, (3) whether the Clayton Act authorized the Commission to order petitioner to divest itself of assets of the McElwain Company which petitioner acquired after it had been charged with violating Section 7, and (4) the sufficiency of the Commission's complaint.

STATUTE INVOLVED

Section 7 of the Clayton Act, c. 323, 38 Stat. 730, 731 (U. S. C., Title 15, Sec. 18), provides:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen compe-

tition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

Section 11 of the Clayton Act, 38 Stat. 734 (U. S. C., Title 15, Sec. 21), provides:

> That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:
>
> Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to

the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. * * *

The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. * * *

STATEMENT

A complaint issued by the Federal Trade Commission on May 18, 1923, charged that petitioner on or about May 11, 1921, acquired substantially all the stock of the W. H. McElwain Company, which it still owned, and that such acquisition had the effect of substantially lessening competition between these companies and was a violation of Section 7 of the Clayton Act. (R. 21.)

The Commission, after extensive evidence had been introduced, found on November 25, 1925 (R. 519), two Commissioners dissenting (R. 544–547), that petitioner's acquisition of the McElwain stock had the effect of substantially lessening competition between the companies and of restraining commerce in various sections or communities (R. 532); that the transactions, after the Commission's complaint had been issued, by which petitioner undertook to divest itself of the McElwain stock and to acquire its assets, were not bona fide and

were "a mere artifice and subterfuge to evade" the Clayton Act and to escape its penalties (R. 541). It concluded that the acquisition of the McElwain stock constituted a violation of Section 7 of the Clayton Act. (R. 542.) It ordered petitioner to divest itself of the McElwain assets which it found had been acquired and were then held as a result of an illegal acquisition of the McElwain stock and to submit within sixty days a plan for the performance of the Commission's order. (R. 543–544.)

Petitioner thereafter made various motions for reconsideration and suspension of the Commission's order. (R. 547, 548, 549, 556.) After the decision in *Thatcher Manufacturing Company* v. *Federal Trade Commission,* 272 U. S. 554, the case was reargued, and on May 10, 1927, the Commission reaffirmed its former order. (R. 558.) On March 3, 1928, a petition to review the Commission's order was filed in the Circuit Court of Appeals and that court unanimously affirmed the Commission's order. (R. 705–714.)

W. H. McElwain Company was in 1921 among the five largest shoe manufacturers in the United States (R. 313–314, 366), the largest in New England (R. 353), and the largest producer in the world of men's and boys' dress shoes (Com. Ex. 2, R. 590). The term dress shoes in this connection means a shoe worn generally as distinguished from those primarily for rough wear, known as work shoes. (R. 177, 221.)

The McElwain Company made medium-priced shoes (R. 158, 647), and in 1921 practically all its production was men's dress shoes (R. 469). It sold its shoes to retailers, jobbers, and wholesalers, and seven branch wholesale houses which it owned or controlled, located in Boston, New York City, Columbus, Chicago, San Francisco, and Kansas City, Missouri. (R. 36–37, 661.) In the year ended May 31, 1921, it sold shoes direct to retailers in 36 States (R. 692–694) and in two other States sold to wholesalers (R. 661).

Petitioner is, and was in 1921, the largest shoe manufacturer in the United States. (R. 34, 208, 313–314.) It made a general line of medium priced men's, women's, boys', misses' and children's shoes (R. 158) and sold exclusively to retailers (R. 112). During the year ended May 31, 1921, it sold in all the 38 States in which the McElwain Company was also selling, except three New England states. (R. 692–694.) According to petitioner's figures, it sold shoes during this period to all the retailers in Kentucky, Mississippi, Tennessee, and Texas and to over 93% of the retailers in Missouri. (R. 693.) During the same period the McElwain Company sold not only to retailers but also to an independent jobber or jobbers in all of these five States. (R. 663, 693.) In Tennessee the McElwain Company sold to 15 retailers and 11 jobbers. (R. 663, 693.) In Missouri it sold to 36 retailers and 6 jobbers (R. 663, 693), and over 15,000 dozen pairs of shoes to

its Kansas City wholesale branch house (R. 661), which in turn was selling exclusively to retailers (R. 165). Both companies sold shoes in the same cities. (R. 60.)

Included among the shoes made and sold by petitioner was a dress shoe for men known as its Patriot brand. Its 1913 catalogue showed 25 different styles of this brand, and its 1921 catalogue 32 different styles. (R. 166.) Its annual production of this brand was from 800,000 to 850,000 pairs, representing sales of about $2,500,000. (R. 168.) These shoes were comparable in price, similar in style and at least equal in quality to the shoes made by the McElwain Company. (R. 158, 166–168, 172, 339–340.) After petitioner acquired the McElwain Company it applied some of that company's shoes to the orders which it had, and it distributed McElwain shoes among its salesmen and sold them to its regular customers. (R. 42.) In the year ended May 31, 1921, petitioner sold its men's dress shoes to 16 retailers to whom the McElwain Company was selling direct. (R. 692–694.)

It is submitted that the statement on page 31 of petitioner's brief that by "similar in style" is meant that both companies made high shoes and low shoes is not correct (R. 166–168, 339–340) and is not supported by petitioner's citation (R. 340). Page 5 of petitioner's 1921 catalogue (Com. Ex. 13, R. 603) shows certain low shoes which the president of petitioner marked as similar to McElwain shoes

(R. 339–340) and also shows other low shoes not so marked. If " similar in style " meant merely that both companies made low shoes, all the low shoes on this page would have been marked.

Negotiations with petitioner in 1921 leading to its acquisition of the McElwain stock were conducted on behalf of the McElwain Company entirely by its President, J. F. McElwain, and its Vice-President, Mr. King, except that Mr. Storrow, as a representative of first preferred stockholders, participated in later stages of the discussion. It was these same two officers who requested the necessary authority from the McElwain board of directors. (R. 295.) The directors at first declined to give this authority and only granted it when the recommendation was renewed some weeks later, with urgency. (R. 295.) This approval appears to have been first given on May 6, 1921 (R. 79), only five days before the final agreement was signed (R. 87).

In the latter part of March, 1921, Mr. McElwain proposed to Mr. Johnson, chairman of petitioner's board of directors, a large consolidation of shoe manufacturers. This proposal was rejected, and no suggestion was made at that time of a separate consolidation of the two companies. (R. 143–144.) On April 8, 1921, Messrs. McElwain and King again conferred with Mr. Johnson. (R. 144.) Subsequently in response to his request for information as to McElwain's financial condition, Mr.

McElwain wrote him that the debts were at the peak on February 28th and would be materially decreased on May 31st; that the sound value of the plant account had been appraised within two years at approximately $2,000,000 above book figures; that production of men's shoes in the East during the past two or three months had been decidedly subnormal, but that the tide had turned and the facts indicated that production would increase from that time on; that McElwain's shipments during the past month had been excellent; that its sales force seemed to be extremely enthusiastic and confident of good results; and that the lowest sale of its common stock which had recently come to their attention was $55 a share against a par value of $50. (R. 640, 642, 644.)

Negotiations were resumed in Boston and New York April 25th, 26th, 27th, and 28th, and again in St. Louis on May 8th. (R. 78–79.) At the latter time the McElwain balance sheet on April 30th was submitted (R. 80), with inventory brought down to market (R. 78) and the final agreement signed on May 11th permitted petitioner to withdraw if this balance sheet was not confirmed by an audit by public accountants (R. 618). The final agreement provided that petitioner would exchange shares of its own stock having a market value of over $9,460,000 for all the McElwain stock on such basis that McElwain first preferred stockholders would receive 82½% of par, its second preferred stockholders 75%

of par, and its common stockholders 50% of par. (R. 85, 87, 614.) Messrs. McElwain and King signed the agreement on behalf of themselves and eight other McElwain directors, who together held a majority of its common stock. (R. 79, 616, 619.)

When the agreement was signed the McElwain first preferred stock was in the hands of the public, the second preferred stock was owned almost altogether by the McElwain organization and their families, and two-thirds of the common stock was owned by its officers and operating executives. (R. 225, 642.) The common stock then had sole voting power. (R. 224–225.) The agreement gave the McElwain common stockholders the right to acquire stock worth almost $1,750,000, although the total value of all the stock offered by petitioner to McElwain stockholders was more than $100,000 less than the par value of its preferred stock then outstanding. (R. 613, 614.) Mr. Storrow, representing the first preferred stockholders, at first refused to approve the agreement and did so only after Mr. King had told him that it was essential that he do so, that the management of the company was on the edge of a breakdown. (R. 300.)

A letter to petitioner's stockholders dated June 16, 1921, signed by the chairman of its board, stated that the acquisition of the McElwain Company and of a tanning company represented a book profit of about $1,000,000 "based on true values of the purchased properties as evidenced by the inventories

and appraisals submitted to us when the purchases were made." (R. 646–649.)

After the Commission had issued its complaint on May 18, 1923, petitioner as a means of meeting this situation decided to take over the McElwain assets and to liquidate the company. (R. 96.) Mr. Blake, petitioner's attorney, went to Boston to carry out this plan. After his arrival Mr. King, who had been the chief executive officer of the McElwain Company since May, 1921 (R. 435), telephoned Mr. Rand, petitioner's president, that he had a different program and obtained full authority from Mr. Rand to go ahead (R. 63).

Late in May or early in June officers and directors of the McElwain Company connected with petitioner resigned and were replaced by friends and business associates of King. (R. 335, 412.) Mr. Warren, for many years the McElwain attorney, became president and a director and his secretary became treasurer, clerk and a director. (R. 392, 410–412.) On June 14th King obtained an option on a $4,000,000 day loan to petitioner from the National Bank of Commerce of New York. (R. 324, 328.) On the 15th King on behalf of petitioner entered into a written contract with Bennett, Limited, whereby petitioner sold, transferred and assigned to Bennett, Limited, substantially all the outstanding McElwain first preferred stock and 491 shares out of some 70,000 outstanding shares of its common stock for a purchase price of

$4,061,094.14. (R. 248, 638.) Bennett, Limited, was a Canadian corporation engaged in the business of making leather and fibre board and the sale of water power; it was not a dealer in securities and so far as King knew, it had no office in the United States. (R. 271, 336.) King testified that he verbally agreed that petitioner would surrender for cancellation, or would procure and have cancelled, all the remaining outstanding McElwain stock, and petitioner later paid $39.50 a share for the common stock which it had not previously acquired. (R. 246, 248.)

On the 16th the McElwain Company opened an account with the National Bank of Commerce of New York by depositing $1,000. (R. 608.) On the 15th or 17th King received in payment for the McElwain stock sold to Bennett, Limited, an uncertified check of Bennett, Limited, for $4,061,094.14, payable to petitioner drawn on the National Bank of Commerce, where its balance was then under $5,000. (R. 256, 611.) King took no steps to find out whether this check was good. (R. 267–268.) On the 19th the McElwain stock covered by the agreement of the 15th was transferred into the name of Bennett, Limited. (R. 498.) On the 20th a meeting of the stockholders of the McElwain Company, attended by Messrs. King, Warren, Blake and a Vice-President of Bennett, Limited, voted to cancel the second preferred and common stock then owned by petitioner; to

accept an offer by petitioner dated June 4, 1923, to purchase all of its assets and assume all its liabilities for $4,063,125.89; and to distribute this purchase price to its stockholders as a liquidation dividend. (R. 677.) On the same day or shortly thereafter instruments conveying its assets to petitioner were executed. (R. 264–265.)

On the 21st petitioner deposited to its account at the National Bank of Commerce of New York the proceeds of the $4,000,000 day loan made to it by that bank; petitioner's check to the McElwain Company for $4,063,125.89 was deposited to the latter's account; McElwain's check to Bennett, Limited, for $4,061,093.72, representing a liquidation dividend, was deposited to the credit of Bennett, Limited; the check of Bennett, Limited, to petitioner for $4,061,093.72 (the written contract called for $4,061,094.14) was deposited to petitioner's credit; and petitioner's $4,000,000 day loan was paid back by the bank charging the amount to petitioner's account. (R. 407–408, 503, 505.) The deposit slips for the four foregoing deposits were all in King's handwriting. (R. 321, 513–514.)

Thus at the end of the day approximately $4,000,000 had changed hands five times and none of the parties remained indebted to another. Except for $2,032.17 reserved to take up 35 shares of first preferred stock not yet acquired, the cash balances of all the parties remained the same as before the transaction; but the assets of the McElwain

Company had been transferred into the name of the petitioner.

Petitioner's answer to the Commission's complaint filed on July 5th stated that it had remedied any technical violation of the Clayton Act by divesting itself of the McElwain stock. (R. 533.) Petitioner's officers in testifying before the examiner endeavored to make it appear that there had been a sale of the McElwain stock entirely dissociated from the subsequent acquisition of its assets. (R. 123–124, 241–246, 251.) Concerning this the lower court said (R. 713):

> The best that petitioner's counsel is able to say in defense of this transaction is that it did not deceive the Commission.

The McElwain Company was in existence as a separate corporate entity when the taking of testimony before the examiner closed. (R. 410, 411, 501, 517.)

SUMMARY OF ARGUMENT

I. Section 7 of the Clayton Act prohibits the acquisition by one corporation of stock of another where the effect may be to substantially lessen competition between them. Since the section deals with probabilities, rather than certainties, potential as well as actual competition is a factor in determining whether the statute has been violated. In this case petitioner in May, 1921, acquired practically all the stock of W. H. McElwain Company and the effect thereof was to terminate competition

between them. There is thus left open only the question of substantial actual or potential competition between the companies in May, 1921, and the Federal Trade Commission's determination on this point is fully supported by the facts and the inferences reasonably to be drawn therefrom. The courts will not reverse an order of the Commission based on inferences reasonably drawn from admitted or proven facts. *Federal Trade Commission* v. *Pacific Paper Association,* 273 U. S. 52, 63.

II. Petitioner's contention that the financial condition of the McElwain Company in May, 1921, would have eliminated it as a competitive factor if petitioner had not acquired its stock rests on the slender foundation that this company would have shortly become insolvent. Not only is the inference of impending insolvency highly speculative and based on an exaggerated statement of the McElwain Company's financial difficulties, but the inference does not even tend to show that if a receivership had resulted the receiver would have discontinued operations. Petitioner has completely failed to show that the only reasonable inference to be drawn from the facts is that the McElwain Company would have gone out of business if the petitioner had not acquired its stock.

III. The jurisdiction of the Commission, obtained when it filed its complaint charging a violation of Section 7 of the Clayton Act, was not defeated because petitioner subsequently used its

illegal stock control to take over the McElwain assets. Under Section 11 of the Act the Commission may make a proper order to cease and desist from a violation of Section 7. This gives the Commission power to require an offending corporation to rid itself both of stock illegally held and of assets which its illegal stock control would enable it to acquire (*Federal Trade Commission* v. *Western Meat Company, supra*). The Commission's order directing petitioner to divest itself of the McElwain assets is therefore valid. If the Commission does not have such power, Section 7 is a dead letter.

IV. The Commission's complaint fully apprised petitioner of the charge it was called upon to meet and the complaint is not invalid because it did not allege detailed evidentiary facts.

ARGUMENT

I

THE FEDERAL TRADE COMMISSION'S DETERMINATION OF SUBSTANTIAL COMPETITION BETWEEN PETITIONER AND W. H. M'ELWAIN COMPANY IN MAY, 1921, IS SUPPORTED BY THE FACTS AND THE INFERENCES REASONABLY TO BE DRAWN THEREFROM

Section 7 of the Clayton Act prohibits one corporation engaged in interstate commerce from acquiring all or a part of the stock of another corporation so engaged where the "effect * * * may be" to substantially lessen competition between them. The section deals with probabilities, not certainties, and, on the other hand, not mere

possibilities. *Standard Fashion Company* v. *Magrane-Houston Company,* 258 U. S. 346, 356–357. Probable future competition—that is, potential competition—is a factor in determining whether the effect of a stock acquisition may be to substantially lessen competition. Petitioner has adopted this view of the statute in contending that the impending insolvency of the McElwain Company in May, 1921, would have shortly eliminated it as a competitive factor.

Petitioner's acquisition of practically all the McElwain stock in May, 1921, not only substantially lessened, it effectually put an end to, all competition between these two companies. This much petitioner appears to concede. (Brief, p. 20.) The question at issue, therefore, is the justification for the Commission's determination of substantial competition in May, 1921. Its determination, if supported by the facts or by the inferences reasonably to be drawn therefrom, is conclusive. *Federal Trade Commission* v. *Pacific Paper Association, supra,* p. 63.

The scope and application of Section 7 are not measured, as contended by petitioner, by the decisions construing unreasonable restraint of trade and monopoly under the Sherman Act. In *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, which involved the prohibitions of Section 3 of the Clayton Act against tying contracts where the "effect * * * may be to substantially lessen

competition or tend to create a monopoly" this Court said (pp. 459–460):

> The Sherman Act and the Clayton Act provide different tests of liability. This was determined in the recent case of *Standard Fashion Company* v. *Magrane-Houston Company, ante,* 346. In that case we pointed out that the Clayton Act was intended to supplement the Sherman Act, and within its limited sphere established its own rule. * * *

Petitioner and the McElwain Company were clearly in competition prior to May, 1921. Both companies made a medium priced dress shoe for men, that is, one suitable for general city or town wear. Both sold extensively in many of the same States. Both sold in some of the same cities. In several cases both sold the same type of shoe direct to the same retailer. That one company used only leather and the other partly substitutes, or that one company emphasized wearing qualities and the other finish (petitioner's brief, pp. 6–7), is no indication of lack of competition. These differences may have led to keener competition than would have arisen from offering purchasers identically the same article.

Competition between the companies was also substantial. While the type of competitive shoe represented a comparatively small per cent of the total production of one company, it represented almost the entire output of the other. For both companies the annual sales volume of the competitive type of

shoe was large, for one company $2,500,000 (*supra*, p. 7), and for the other at least $15,000,000 (R. 661). While in certain regions, chiefly New England, the Record does not indicate much competition, in other regions both companies sold extensively. Petitioner's principal place of business is in Missouri and its customers' list during the year ended May 31, 1921, included 93% of the total number of retailers listed in that State (*supra*, p. 6). During the same period, when the McElwain Company's output and sales were far below normal, it sold in Missouri 25,659 dozen pairs, or 615,816 shoes, as follows:

	Dozen pairs
Retailers (R. 660)	5,939
Wholesaler (R. 661)	15,453
Jobbers (R. 663)	4,267
Total	25,659

During the same period petitioner was selling to over 70% of the California retailers (R. 694), and McElwain's net sales to its wholesale house in California were over $357,000 (R. 661), in addition to sales of 790 and 796 dozen pairs to retailers and jobbers, respectively (R. 660, 663).

The statement on page 8 of petitioner's brief that it sold only 52½ dozen pairs of men's dress shoes in the year ended May 31, 1921, to McElwain customers does not tell the entire story. The figures were obtained by computing petitioner's sales of its men's dress shoes to McElwain customers. Since petitioner sold only to retailers, the sales of the

McElwain Company to wholesalers and jobbers were eliminated from the comparison and computation. (See a trifling exception, R. 450.) Of the total McElwain sales for the year ended May 31, 1921, only one-fifth were direct to retailers, and of its total sales to wholesalers, jobbers, and retailers, less than one-fourth were direct to retailers. (R. 661.) Furthermore, the McElwain Company in its sales direct to retailers catered to large retailers, leaving to its wholesalers and jobbers the field of the small retailers to whom petitioner chiefly sold. (Petitioner's brief, p. 7.) The reasonable inference is that many times 52⅓ dozen pairs of petitioner's men's dress shoes were sold to retailers who were at the same time purchasing McElwain shoes.

Competition is not a narrow term embracing only such sales as are made to the same type of marketing organization. The basic competition between manufacturers is for the favor of the ultimate consumer. If two manufacturers, as in this case, sell in the same territory a medium-priced shoe designed for the same kind of consumer, their competition is not limited to the sales made direct to retailers; it covers the entire sales volume so far as it is distributed in the same general territory.

The figures showing the retailers purchasing at the same time the same type of shoe direct from both companies, even when understood as resulting from consideration of less than one fifth of the McElwain sales, are not an adequate test of competition. Retailers, particularly small retailers, do

not ordinarily put in two different stocks of the same type of shoe. The McElwain shoe, whether sold to retailers direct or through intermediate wholesalers or jobbers, might prevent petitioner from extending, or might cut off, the number of retailers purchasing its dress shoe for men, and the two companies be in active competition although no single retailer bought men's dress shoes at the same time from both companies.

The same objection lies against petitioner's comparison of the customers of the two companies based on size of the cities where located (brief, p. 8), namely, that it does not reflect the retailers who obtained shoes from McElwain wholesalers or jobbers. Of course, wholesalers and jobbers are in large centers. With respect to the retailers to whom the McElwain Company sold direct, figures presented by petitioner show that during the year ended May 31, 1921, 88 out of a total of 380, or over 23%, were in towns of less than 10,000. (R. 690–694.) The statement on page 8 of petitioner's brief that 95% of its sales were in towns or communities of 6,000 inhabitants or less is the estimate of the chairman of its board made on cross-examination. It did not purport to be based on any examination of sales records. It is a percentage of total sales, only a small part of which were men's dress shoes. Petitioner did not offer to show what percentage of its men's dress shoes were sold in towns of less than 6,000 or of less than 10,000.

The facts in this case wholly differentiate it from *Thatcher Manufacturing Company* v. *Federal Trade Commission*, 272 U. S. 554, 560. In that case this Court said that it agreed with the court below that the Woodbury Glass Company was not in competition with the Thatcher Company within the meaning of the statute. The lower court, in *Federal Trade Commission* v. *Thatcher Manufacturing Company*, 5 F. (2d) 615, 622, had found that the Thatcher Company was engaged in the manufacture of milk bottles; that the Woodbury Company was engaged chiefly in the manufacture of condiment and whiskey bottles; that its manufacture of milk bottles stock was very small; that the Thatcher Company's real object in acquiring the Woodbury stock was to obtain a patent license to manufacture bottles in a branch of the glassware business in which it was not then engaged. As to the Woodbury Company it said:

> The evidence also shows that it was gradually getting out of the milk bottle business and that, indeed, before the transaction in question arose it had determined to do so. * * *

There was therefore in that case not only no substantial competition, there was no prospective competition of any kind.

The question of substantial competition is one of fact. The lower court stated that it had carefully examined the record—

> with the result that we find that the inferences of the Commission are not only reason-

ably drawn from undisputed facts, but that no other inferences could, reasonably, be so drawn. (R. 708.)

II

THE EVIDENCE DOES NOT ESTABLISH THAT THE M'ELWAIN COMPANY WOULD HAVE GONE OUT OF BUSINESS, THEREBY TERMINATING COMPETITION, IF ITS STOCK HAD NOT BEEN ACQUIRED BY PETITIONER IN MAY, 1921

Petitioner contends that its acquisition of the McElwain stock could not have had the effect of substantially lessening competition because of the financial difficulties of the McElwain Company in May, 1921. Petitioner emphasizes the probable loss to stockholders and the probable insolvency under the laws of Massachusetts but for the stock acquisition. These considerations are irrelevant except for their bearing upon the probable continuance of the company as a going concern. Petitioner does not contend, and there is nothing in the record to show, that the McElwain properties would have been more valuable if dismantled than if operated so that a receiver appointed to conserve the assets for the benefit of creditors and stockholders would have disbanded the organization and permanently closed down plants. Such proof, however, is essential to a showing that the financial difficulties would have terminated competition between the companies.

It is a matter of common knowledge that many large and successful industrial concerns, as well as

numerous railroads, have at one time or another passed through receiverships. In certain cases stockholders have been completely wiped out. No inference that this would have been the probable result in this case is possible. The representative of the first preferred stockholders was extremely reluctant to approve the deal with petitioner which gave to the first preferred stockholders 82½% of par.

The evidence, moreover, does not even establish that a receivership would have resulted. The McElwain Company had been operating at a loss, but petitioner had also at times lost a million dollars a month (R. 176), and petitioner's president testified that he did not think that the combined shoe manufacturers of the United States earned anything in 1921 (R. 105). McElwain's net liquid assets had been greatly reduced, but petitioner was willing to pay over $9,460,000 for its net worth over and above all liabilities and a month later petitioner advised its stockholders that its purchase was profitable. It is represented that the McElwain Company could not sell its goods, but in April, 1921, its president advised in writing that the tide had turned, that the facts indicated that production would increase, that the sales force seemed to be extremely enthusiastic. (R. 644.) It is represented that the management was demoralized and on the verge of a physical breakdown, but the reason given by petitioner for wishing to acquire the McElwain stock, rather than

its assets, is that petitioner wished to obtain the immediate benefit of the McElwain management. (R. 50–51.)

Petitioner asserts (brief, p. 9) that "efforts to secure extensions or new capital had been exhausted." This is not supported by the record. The record shows no failure to obtain an extension. On the contrary, the record shows that credit had never been curtailed. In a letter written after the deal with petitioner was closed the McElwain president stated that the banks had not up to that time restricted its credit. (R. 579.) As to exhaustive efforts to obtain new capital, a witness reported statements of the McElwain president that new capital could not be obtained and that one banking house had been approached. (R. 350.) The strongest statement made by the only representative of a bank creditor called as a witness by petitioner was that it was his bank's "intention to ask" the McElwain Company to pay its loan. (R. 354.)

During the first nine months of its 1921 fiscal year, on an average capitalization of $13,130,350 (R. 645, 656), the McElwain Company paid dividends of $644,090.75 (R. 646), or at an annual rate of over 6½%.

Petitioner states (brief, p. 21), without any supporting citation, that since petitioner's acquisition the McElwain plants have not been operated with profit, and again (brief, p. 43), also without citation, that petitioner's experience shows that the McElwain Company's business when operated

could not pay its debts. It is difficult to reconcile these allegations with the opinion expressed by the chairman of petitioner's board in a letter dated October 6, 1927, that on a proper capitalization based on the book value of the McElwain assets—

> very good earnings could be shown on the Common Stock; quite a little more than the average on industrial. (R. 575.)

The record also does not justify petitioner's statement (brief, p. 43) that since the Federal Trade Commission made its order, repeated efforts to find a purchaser for the McElwain property, even at a substantial loss, have failed. It is submitted that no very serious effort to sell is shown when no definite sales price was ever named. (R. 560–578.)

The advances made to the McElwain Company by petitioner after May 11, 1921, do not show that the banks "exacted payment" (petitioner's brief, p. 42). The reasonable inference is that petitioner voluntarily reduced bank indebtedness. No evidence was offered that any bank had required payment of its advances.

Changes in the McElwain balance sheet between May 31, 1921, and November 30, 1921, while the company was operated as a subsidiary, are not a reliable index to what would have happened if petitioner had not taken over the company. Surplus account may have been affected by a drastic policy of charging off all doubtful accounts. The existence of

stockholders who had not exchanged their stock furnished at least an incentive to make an unfavorable income statement.

American Press Association v. *United States,* 245 Fed. 91, turns upon entirely different facts. In an action brought under the Sherman Act a consent decree had been entered in 1912 which permanently enjoined Western Newspaper Union from combining with American Press Association by purchase or otherwise. In May, 1917, the latter asked for a modification of the decree to permit the sale of its plant as a going concern to the former company. The court found that Western Newspaper, due to the greater diversity of its business, in one field offered greater service and in another field had lower costs, than American Press; that as a result American Press was being run at a loss, which loss was progressively increasing; that its business was being continued only until the question whether Western Newspaper could purchase its plant as a going concern was decided; and that if this purchase should not be permitted the directors had decided to wind up the business as speedily as possible. The court modified the decree as requested, but inserted provisions that the output of the plant should be sold only at cost plus a reasonable profit.

A case much closer to the present one is *Aluminum Company of America* v. *Federal Trade Commission,* 284 Fed. 401, 404, certiorari denied, 261 U. S. 616. This was a proceeding to review an order

of the Federal Trade Commission issued on a finding of a violation of Section 7 of the Clayton Act. The court found that due to a change in price conditions the business of the competitor which was acquired was being operated at a loss and that it appeared that this situation would continue. The court nevertheless affirmed the Commission's order.

In *Swift & Company* v. *Federal Trade Commission,* 8 F. (2d) 595, the court held that the Commission properly found that the effect of the stock acquisitions there in question was to substantially lessen competition, this Court subsequently reversing on other grounds, *Swift & Company* v. *Federal Trade Commission,* 272 U. S. 554, 561. In a concurring opinion it was said (p. 599):

> If an exception to the operation of the statute ought and is to be raised in cases where the concern whose stock is acquired is comparatively small or weak, or for any reason unlikely long to endure, it must come through statutory enactment, and not by judicial construction.

III

THE FEDERAL TRADE COMMISSION HAD POWER TO ORDER PETITIONER TO DIVEST ITSELF OF THE ASSETS OF THE M'ELWAIN COMPANY ACQUIRED BY PETITIONER AFTER THE COMMISSION HAD ISSUED A COMPLAINT CHARGING IT WITH VIOLATING SECTION 7 OF THE CLAYTON ACT

Section 11 of the Clayton Act provides that if the Commission finds that any of the provisions of Section 7 have been violated it shall issue an order

requiring the offending corporation "to cease and desist from such violations, and divest itself of the stock held * * *, in the manner and within the time fixed by said order."

In *Thatcher Manufacturing Company* v. *Federal Trade Commission, supra,* and in *Swift & Company* v. *Federal Trade Commission, supra,* this Court held that, construing Sections 7 and 11 together, the Commission had no jurisdiction if ownership of a competitor's property had been obtained prior to any action by the Commission even though this was brought about through stock illegally held. The Court clearly intimated in its opinion in the latter case that the Commission obtained jurisdiction when it issued its complaint. It said (p. 563):

> As all property and business of the two competing companies were acquired by the petitioner prior to the filing of the complaint, it is evident that no practical relief could be obtained through an order merely directing petitioner to divest itself of valueless stock. As stated in number 213, we are of opinion that under Secs. 7 and 11 of the Clayton Act the Commission is without authority to require one who has secured actual title and possession of physical property before proceedings were begun against it to dispose of the same, although secured through an unlawful purchase of stock. * * *

Federal Trade Commission v. *Western Meat Company,* 272 U. S. 554, 557, decided at the same

time, held that where the Commission had jurisdiction and found a violation of Section 7 it could order a divestment of stock that would include a divestment of the plant and property of the corporation the stock of which had been illegally acquired. This Court said (p. 559):

> Without doubt the Commission may not go beyond the words of the statute properly construed, but they must be read in the light of its general purpose and applied with a view to effectuate such purpose. Preservation of established competition was the great end which the legislature sought to secure.
>
> The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property. * * *

If the Commission can not, although it assumed jurisdiction prior to petitioner's acquisition of assets, order petitioner to divest itself of assets acquired through its illegal stock control, then Section 7 is an empty gesture and Congress in enacting it provided no effective enforcement machinery. Any company attacked for a violation of the section could use its stock control to take over assets and thus defeat the jurisdiction of the Commission. Section 11 requires the Commission to grant a hearing before issuing an order pursuant to a complaint charging a violation of Section 7 and the Commission has no equitable power to order a continuance of the *status quo pendente lite* (*National Harness*

Manufacturers' Association v. *Federal Trade Commission,* 268 Fed. 705, 707; *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45, 48).

The terms of the statute are broad enough to cover the Commission's order requiring petitioner to "cease and desist from the ownership, operation, management, and control" of the McElwain assets and to divest itself thereof. (R. 543.) Where violations of Section 7 have occurred, the Commission has power under Section 11 to make an order to cease and desist from "such violations" in the "manner" fixed by its order. In this case after Section 7 had been violated, petitioner used its illegal stock control to acquire the McElwain assets. Petitioner in so acting intended to defeat the statutory purpose, "preservation of established competition." The Commission can effectively cure the violation of Section 7 only by providing in its order that the McElwain plant and property be divorced from petitioner's control.

It is immaterial that the Commission would have had no jurisdiction if petitioner had originally purchased assets instead of stock. Petitioner's purchase of stock rather than assets was more than a technical difference both in purpose and in its effect. Petitioner refused to buy the McElwain assets (petitioner's brief, p. 14); it did buy the McElwain stock. The form of the transaction also affected property rights in a marked degree. If assets had been bought at the price paid for stock,

McElwain's first preferred stockholders would have received the par value of their stock instead of 82½%, second preferred stockholders would have received over 90% of par instead of 75%, while the common stockholders would have received nothing instead of 50% of par.

IV

THE COMPLAINT OF THE FEDERAL TRADE COMMISSION WAS SUFFICIENT

The complaint alleged that while petitioner and the McElwain Company were in competition with each other in interstate commerce in the shoe business petitioner acquired all or substantially all the McElwain stock; that it still owned and controlled such stock; that such acquisition was violative of Section 7 of the Clayton Act; and that the effect of the acquisition was to substantially lessen competition between the two companies and to restrain commerce in the shoe business in the sections and communities in which the two companies were engaged in business in interstate commerce as set forth in preceding portions of the complaint. (R. 21–23.)

Petitioner's attack on the complaint is that it does not allege all the detailed evidentiary facts tending to prove the ultimate facts which were alleged. The complaint in a proceeding of this kind does not require the exactitude of an indictment at common law. *Swift and Company* v. *United States,*

196 U. S. 375, 395. A similar complaint was upheld in *Aluminum Company of America* v. *Federal Trade Commission, supra.* (No. 834, October Term, 1922, R. 2.)

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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NOVEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929